IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No._____.

SPLINT COAL CORPORATION, - - - - - *Petitioner,*

v.

MRS. WALTER ANDERSON, ADMINISTRATRIX OF THE ESTATE OF WALTER ANDERSON, DECEASED, - - - - - - - - *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the United States Supreme Court:

The petitioner, Splint Coal Corporation, comes now and complaining of and about a decision of the United States Circuit Court of Appeals for the Sixth Circuit herein, delivered, February 14, 1940 (Tr. 80), rehearing denied March 13, 1940 (Tr. 87), seeks a writ of certiorari to review said decision and shows:

I.

That Walter Anderson, deceased, was employed by petitioner as a coal loader in its mines at Splint, Kentucky, and on August 17, 1936, while engaged in removing coal and debris from said mine, and from the very place therein where the injury occurred, was struck by a stone known in mining parlance as a "Kettle back" or "Horse back" which fell from the roof, and was injured.

II.

That afterward Anderson, who was then living, on December 14, 1937, had a verdict and judgment against petitioner for $6,500.00 in the District Court of the United States for the Eastern District of Kentucky, on account of said injury.

III.

That on appeal to the United States Circuit Court of Appeals for the Sixth Circuit, that Court on February 14, 1940, affirmed said judgment and on March 13, 1940, overruled petitioner's petition for rehearing.

IV.

That in so doing said Court held that petitioner was under a legal duty to furnish Anderson a safe place to work, ignoring and refusing to apply the settled law of Kentucky which is to the effect that

where a servant is engaged in work at the time of an injury that creates the condition that causes the injury the master is under no duty to furnish a safe place.

Wherefore, the premises considered, petitioner, Splint Coal Corporation, prays a writ of certiorari herein directed to the United States Circuit Court of Appeals for the Sixth Circuit to review the decision of said Court herein to the end that the errors therein may be corrected.

CLEON K. CALVERT,
Attorney for Petitioner.

RAY O. SHEEHAN,
Of Counsel.

INDEX TO POINTS DISCUSSED AND AUTHORITIES CITED.

ALPHABETICAL LIST OF AUTHORITIES CITED.

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BRIEF FOR PETITIONER.

If this Honorable Court please:

On February 14, 1940, the *United States Circuit Court of Appeals* for the *Sixth Circuit* affirmed a judgment of the *District Court* for the *Eastern District of Kentucky* in this case (80).[1] On March 13, 1940, that *Court* overruled petitioner's petition for rehearing (87). This writ is sought to review that decision.

JURISDICTION.

Jurisdiction is invoked under *Sec. 240 (a)* of the *Judicial Code (Act Feb. 13, 1925, 43 Stat. 936, 28 U. S. C. A., Sec. 240 (a)):*

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[1]Figures in parenthesis refer to pages of transcript.

(a) Because by the decision the *United States Circuit Court of Appeals* for the *Sixth Circuit* has entirely disregarded and refused to give effect to the laws of Kentucky, and

(b) To the established rule in the *Federal Courts.*

THE FACTS.

On August 17, 1936, Walter Anderson was a coal loader employed by petitioner in its mines.

On that day while working in a place from which coal was being presently recovered, Anderson received an injury by the falling of a "Kettle-back" from the roof of the working place. Anderson thus describes the place in which he was working at the time the injury occurred (28):

> "As to the prop which was shaken there and as to how close the prop was to this piece of slate, and how near from the roof it fell from the prop; this piece of slate fell between the prop and the face of the coal. I could not state the distance it was out from the prop; it was pretty close to the face."

The timber Anderson is talking about is what is known in all mines as the "safety timber." That is the timber that always sets nearest the face of the coal. The space between this timber and the coal face is the point of present operations, and he who is working there is engaged in presently removing support from the roof.

ARGUMENT.

It is the law of Kentucky, settled by many cases, that where a servant is presently engaged in labor that tends to create the condition that causes an injury the "safe place" rule has no application.

(a) Smith v. North Jellico Coal Company, 131 Ky. 196, 114 S. W. 785, 28 L. R. A. (N. S.) 1266.

(b) Ballard & Ballard Company v. Lee, 131 Ky. 412, 115 S. W. 732.

(c) Boyd v. Crescent Coal Company, 141 Ky. 789, 133 S. W. 777.

(d) Proctor Coal Co. v. Beaver, 151 Ky. 839, 152 S. W. 965.

(e) Wallsend Coal & Coke Company v. Shields, 159 Ky. 644, 167 S. W. 918.

(f) North East Coal Company v. Setser, 169 Ky. 245, 183 S. W. 553.

(g) Hazard Coal Company v. Wallace, 181 Ky. 636, 205 S. W. 692.

(h) Atlas Stone Company v. Ingram, 193 Ky. 272, 235 S. W. 721.

(i) Dunn Coal Company v. Fike, 238 Ky. 376, 38 S. W. (2d) 201.

(j) High Splint Coal Company v. Baker, 247 Ky. 436, 57 S. W. (2d) 60.[2]

It is settled in Kentucky that the master does not owe his servant any duty to furnish a safe place to

[2]And see also Gregg v. Stonega Coal & Coke Company, 177 Ky. 718, 198 S. W. 6; Lyttle v. Rex Coal Company, 177 Ky. 660, 197 S. W. 1070; Elkhorn Mining Corporation v. Vanhoon, 179 Ky. 529, 200 S. W. 921, 15 A. L. R. 1378; Charles v. Elkhorn Mining Corporation, 179 Ky. 288, 200 S. W. 461; New Hughes Jellico Coal Company v. Gray, 173 Ky. 337, 191 S. W. 78; Stonega Coal & Coke Company v. Clark, 205 Ky. 745, 269 S. W. 1021; Perkins-Harlan Coal Company v. Mercer, 235 Ky. 618, 32 S. W. (2d) 14.

perform his labors, where the character of the work being done creates the condition of danger. In proof of this we offer all the cases cited *supra* and those cited in footnote 2. The same rule has been laid down in *Federal* cases[3] and in other jurisdictions.[4] But whatever the rule may be otherwheres, this rule is well settled in Kentucky.

The learned *Circuit Court of Appeals* failed to give expression to this rule. In that we think there is error.

CONCLUSION.

We respectfully ask a certiorari and a reversal.

CLEON K. CALVERT,
Attorney for Petitioner.

RAY O. SHEEHAN,
Of Counsel.

Pineville, Ky.,
May 30, 1940.

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[3]See C. C. C. & St. L. Railroad Company v. Brown, 73 Fed. 970, 20 C. C. A. 147; Baird v. Reilly, 92 Fed. 884, 35 C. C. A. 78.

[4]Sloss-Sheffield Steel, etc., Company v. White, 187 Ala. 605, 65 So. 999; Central Coal, etc., Company v. Graham, 129 Ark. 550, 196 S. W. 940; Calumet Fuel Company v. Rossie, 60 Colo. 87, 151 Pac. 935; Schultz v. Burnwell Coal Company, 180 Ill. Aff. 693; Carson v. Miami Coal Company, 141 N. E. 810; Mitchell v. Phillips Mining Company, 181 Ia. 640, 165 N. W. 108; Brooks v. Central Coal, etc., Company, 96 Kas. 530, 152 Pac. 616.